

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2510

To be argued by
NICHOLAS FIGUEROA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2510

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGEL ISAAC,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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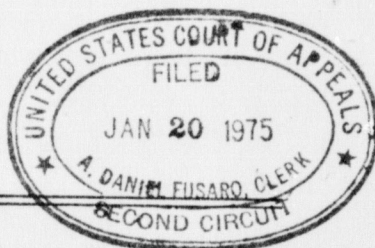


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Preliminary Statement

Angel Isaac appeals from an order filed April 3, 1974, in the United States District Court for the Southern District of New York by the Honorable Thomas P. Griesa, United States District Judge, denying without a hearing Isaac's motions for a new trial and his release on bail.

Indictment 72 Cr. 1362, was filed on December 20, 1972, in five counts. Count 1 charged Isaac and Heriberto Prosper with conspiracy to distribute cocaine. Title 21, United States Code, Section 846. Isaac was also charged in Counts 2 and 5 with the substantive offense of possession of cocaine with intent to distribute. Title 21, United States Code, Sections 812 and 841.*

* Prosper was named in substantive Counts 2, 3 and 4. Prior to Isaac's trial, at which he testified on behalf of the Government, Prosper pleaded guilty to all of the four counts in which he was named, and was sentenced on July 27, 1973 to concurrent terms of imprisonment of one year.

Trial of Isaac began on June 27, 1973, before Judge Griesa and a jury. On July 2, 1973, the jury found Isaac guilty on all of the three counts in which he was named. On September 11, 1973, Judge Griesa sentenced Isaac to concurrent four year terms of imprisonment on each of the three counts.

Isaac's conviction was affirmed by this Court on direct appeal on January 9, 1974, 489 F.2d 753, and *certiorari* was denied by the Supreme Court on May 28, 1974, 417 U.S. 913. Thereafter, on September 23, 1974, Isaac's motion for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure was denied.

Isaac is presently serving his sentence.

Statement of Facts

A. The Trial

I. The Government's Case

The principal witness against Isaac was Special Agent Robert Joura of the Bureau of Narcotics and Dangerous Drugs. He testified that upon arriving at the Point Blank Boutique, Bronx, New York, on the evening of August 2, 1972, he was introduced by an informant to its owner, Angel Isaac, as a prospective buyer of cocaine. Joura testified that he was then led by Isaac to a basement office where Isaac handed him a tinfoil packet containing a sample of cocaine, which Isaac claimed was below the quality he usually handled. Joura testified that near the end of this meeting Isaac quoted a price of \$2,150 for an eighth of a kilogram of cocaine (Tr. 7-8, 75-76; GX 1C).*

* "Tr." refers to the stenographic transcript of the trial. "GX" refers to Government exhibits received in evidence.

Agent Joura also testified to further negotiations at the boutique on September 6, 1972, during which Isaac quoted prices to him of \$2,200 and \$4,200 for an eighth and a quarter kilogram of cocaine, respectively. Towards the end of these negotiations, Joura testified that Isaac took a piece of scrap paper, scrawled his name and telephone on it and handed it to him with instructions to phone when he was ready to do business (Tr. 8-9, 106; GX 5).

Joura testified he arranged a third meeting with Isaac on September 13, 1972, at the informant's place of business, the American Revolution Boutique, located a few blocks from Isaac's store. He testified that Isaac had announced that he was on his way to pick up a quarter of a kilogram of cocaine from "Eddie". Isaac's car was then followed by surveillance agents to 540 West 143rd Street, Manhattan, "Eddie" Prosper's address. Ten minutes later Isaac was observed leaving that building while examining the bulky contents of a brief case which he carried. He was followed by surveillance cars back to the boutique, where Joura awaited his arrival. Joura testified that upon his return to the boutique, Isaac reached into his brief case and extracted a brown paper bag containing two clear plastic bags, from which he allowed the Agent to test a sample of white powder before setting a price of \$4,300 for the contents. (Tr. 9-15, 79-88).

Joura described how, upon his complaining of the price, Isaac sought to placate him by promising that the owner of the cocaine, "Eddie", would be arriving momentarily and that Joura could bargain directly with him for a better price. (Tr. 13-15).

Joura further testified that upon Prosper's arrival there ensued a series of mini-conferences between Prosper and Isaac in which the price of a "quarter" was reduced successively for Joura from \$4,300 to \$4,100, and finally to \$3,900 with a spoon of cocaine "off the top" for Isaac to compensate him for his "coming down in price." (Tr. 17).

Finally, the negotiations were terminated because of Joura's feigned sales resistance, and Isaac and Prosper left the boutique (Tr. 18-19, 89). They were seen conferring briefly in front of the store and then getting into separate cars, each of which made a right turn at the corner and came to a halt in the middle of the block. Surveillance agents then observed Prosper leaving his car and walking back to Isaac's car, where he was handed a brown paper bag. (Tr. 89, 109, 305-306).

Joura testified that, after ascertaining Prosper's address in Manhattan, he visited him at his apartment on the following day without Isaac's knowledge and managed to buy half the contents of one of the plastic bags for \$1,900. (Tr. 27-28, 306-307; GX 2C).

II. The Defense Case

Isaac, testifying on his own behalf, admitted that Agent Joura and the informant had been at his boutique on August 2, 1972, but denied that the second and third meetings with Joura took place. He denied giving Agent Joura a slip of paper with his name on it and claimed instead that he had probably given it to the informant (Tr. 222-229, 261-284; GX 5).

Isaac also called Rafael Caballero and John Denizard, his employees, who denied that Agent Joura had been introduced to Isaac on the Agent's August 2, 1972 visit to the boutique. They testified that Isaac had remained downstairs in his basement office during the entire length of Agent Joura's visit. On cross-examination they both admitted that except for a few minutes they had remained working upstairs while the Agent and the informant were downstairs in the basement office with Isaac (Tr. 145-155, 156-169).

III. The Government's Rebuttal Case

Heriberto "Eddie" Prosper testified that he provided Isaac with the quarter of a kilogram of cocaine on September 13, 1973, which was offered to Agent Joura at the American Revolution Boutique. He also testified to receiving prior telephone calls from Isaac inquiring about the availability of cocaine, their financial agreement, and his supplying of the cocaine subsequently given to Agent Joura by Isaac as a sample (Tr. 296-300, 302-303).

Agent Joura testified that the scrap of paper with Isaac's name and phone number had been given to him by Isaac on September 6, 1972. He also testified concerning the recovery from Isaac's apartment of a tinfoil packet containing a small quantity of cocaine at the time of his arrest on November 14, 1972 (Tr. 284-287).

IV. Defense Rebuttal Case

Randolph Ortiz testified that once during the early part of September, 1972, he and Isaac had met Agent Joura at the Point Blank Boutique, but that he never saw any cocaine. (Tr. 348-351).

B. The Motion for a New Trial

By notice of motion dated February 14, 1974, Isaac moved for a new trial on the basis of allegedly newly discovered evidence that Prosper's testimony against him at the trial had been false. In support of the motion, Isaac and Denizard, a defense witness at trial, asserted in identical affidavits sworn to February 8, 1974, that Isaac had admitted to them in January, 1974, that he had testified against Isaac because of physical abuse and threats to deport his wife and children by government agents. Attached to the motion papers was also a letter dated February 3, 1974, to defense counsel from one Edwin Montalvo,

who asserted that in September, 1973, when he and Prosper were incarcerated in West Street, he had asked Prosper "... why did he go against Angel [Isaac]"; Prosper is said to have responded that he had "framed" Isaac because of threats against his wife and himself by Government agents.* Finally, defense counsel submitted an affidavit stating that he was in possession of a tape of a conversation between Isaac and Prosper in Spanish and "had been informed that Mr. Prosper alludes to government inspired pressures directly on his testimony."

In opposition the Government furnished an affidavit of the Assistant United States Attorney in charge of the case, denying that the Government had made threats against Prosper. Also submitted was an affidavit by Prosper, who swore that his trial testimony was the truth and that, if he were to testify again, his testimony would remain the same. Prosper also related three post-trial encounters with Isaac, accompanied once by Denizard and once by a man said to be his attorney, and on one occasion alone. At these encounters, which Prosper informed Agent Joura of because he was frightened, Isaac unsuccessfully importuned him to change his testimony.

On April 3, 1974, Judge Griesa denied the motion without a hearing after argument by counsel. (Isaac's Appendix, Item C **). Judge Griesa found it unnecessary to have the tape translated and transcribed, finding that he would not, given Prosper's affidavit, credit any recorded recantation by

* Interestingly, months prior to the dates of his affidavits and letter submitted in support of his motion for a new trial, Isaac stated at the time of sentence, on September 11, 1973: "I have over the summer months been able to contact two or three other people that will testify or give me sworn affidavits that Mr. Prosper was lying about my involvement with the whole case." (Transcript of Sentence, page 9).

** Citations to "H. Tr." refer to the transcript of this proceeding, which is reproduced in part in Isaac's appendix.

Prosper given in Isaac's presence because of the obvious pressures that would have been exerted on Prosper at such a confrontation.* The Judge found that Prosper had given truthful testimony at trial which was overwhelmingly supported by other evidence and that the trial testimony of Isaac and Denizard had been patently false (H. Tr. 13-20).

ARGUMENT

The District Court did not abuse its discretion in denying Isaac's new trial motion without a hearing.

Isaac claims he was entitled to an evidentiary hearing on his claim that Prosper had perjured himself at Isaac's trial. The contention is without merit.

It has long been settled in this Circuit that on motions for a new trial a trial judge may resolve disputed questions of fact and issues of credibility without an evidentiary hearing, indeed on the face of the affidavits submitted by the parties. *United States v. Johnson*, 327 U.S. 106 (1946); *United States v. Persico*, 339 F. Supp. 1077, 1083 (E.D. N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); *United States v. Trudo*, 449 F.2d 649, 653-654 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *United States v. Astore*, 309 F.2d 144 (2d Cir. 1962); *United States v. Troche*, 213 F.2d 401 (2d Cir. 1954); *United States v. On Lee*, 201 F.2d 722 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953); *United States v. Bradwell*,

* The Court also pointed to the fact that there was no affidavit from Isaac, who had concededly made the tape of his interview with Prosper, concerning what the tape would reveal or what was said at that meeting. Defense counsel had earlier conceded that the tape-recorded meeting was not the same one referred to in Isaac's affidavit (H. Tr. 4-5).

295 F. Supp. 958, 961 (D. Conn. 1968).^{*} Here Judge Griesa had not merely affidavits but also his knowledge of the trial record and his observations of the affiants on both sides when they testified at trial.

The cases cited above, many of which involve alleged post-trial recantations, establish that Judge Griesa was entitled to weigh the credibility of the "newly discovered evidence" on the basis of the affidavits, the evidence at trial, and his judgment of the truthfulness of the affiants from their trial testimony. His assessment of Isaac and Denizard as perjurers was one which the jury clearly shared.^{**} Cf. *United States v. Bradwell*, *supra*, 295 F. Supp. at 961. His belief that Prosper had told the truth at trial was entirely reasonable and consistent with the verdict. Finally, since "recantations of testimony given at trial are 'looked upon with the utmost suspicion'", *United States ex rel. Rice v. Vincent*, 491 F.2d 1326, 1332 (2d Cir. 1974), there was no basis for Judge Griesa to accord any weight to the one Prosper had been said to have made, even if it suggested something more reliable than the testimony of

^{*} *Taylor v. United States*, 487 F.2d 307 (2d Cir. 1973), on which *Isaac* relies, has nothing to do with the issue, for it involves a motion under 28 U.S.C. § 2255, which has distinct statutory requirements. *Procunier v. Atchley*, 400 U.S. 446 (1971), does not appear to discuss the proposition for which it is cited and in any event involved a habeas corpus petition by a state prisoner.

^{**} While the Judge had not heard Montalvo testify, it was clearly reasonable for him to reject Montalvo's letter on the basis of 1) his assessment of the truthfulness of Prosper's trial testimony; 2) the fact that Montalvo was confined for criminal activity; and 3) the plainly coercive circumstances clearly underlying the "recantation" Montalvo's unsworn letter asserted. Moreover, Prosper's affidavit pointed out, and it was not controverted, that he had testified as a government witness at the trial of a co-defendant of Montalvo's.

Isaac and Denizard,* given the inherently threatening circumstances under which Isaac said he had secured it and the fact that Prosper swore that his trial testimony was true.

Under these circumstances, the hearing Isaac alleged he was entitled to would be without purpose,** and there is no showing of any abuse of discretion in Judge Griesa's denial of a hearing and of the motion. *United States v. Trudo, supra; United States v. Troche, supra; United States v. On Lee, supra; see also United States v. Maddox, 444 F.2d 148, 152 (2d Cir. 1971).*

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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* This could only have been the alleged tape of a conversation between Isaac and Prosper, but the only evidence that it contained a recantation was defense counsel's repetition of Isaac's unsworn assertion to him of what had been said (H. Tr. 6).

** The question of the proper standard for granting a new trial on the basis of the "newly discovered evidence" (Isaac Brief at 7, 9-11) is beside the point if the "evidence" is false, as Judge Griesa determined it to be.

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